Supreme Court, U.S.
FILED
SEP 18 1995
CLERK

No. 95-378

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF TRIAL COURT

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25 pp

QUESTIONS PRESENTED

1. Did this Court, in remanding this case to the District Court, intend to circumscribe the District Court's inherent discretion to allow Appellees to amend their complaint to challenge Appellants' admitted use of race in drawing district lines as a conscious attempt to separate voters by race pursuant to *Shaw v. Reno*, 113 S. Ct. 2816 (1993)?

2. Where Appellees have suffered a cognizable injury as a result of residing in districts that admittedly were drawn on the basis of race, do Appellees have standing to challenge Appellants' apportionment plan in its entirety?

3. Where the Appellant majority members of the Apportionment Board have abdicated their responsibility to the electorate of Ohio to create a lawful redistricting plan, do Appellees, as dissenting members of the Board, have standing to challenge Appellants' plan in its entirety?

4. Can Appellants divest the District Court of jurisdiction to amend its Opinion following trial by purporting to file a notice of appeal even though the District Court has not decided upon a remedy or entered a final judgment?

5. Can Appellants, by using racial considerations as their predominant motivating factor in drawing district lines, "subordinate" traditional districting principles to racial considerations under *Miller v. Johnson*, 115 S. Ct. 2475 (1995)?

6. Where there is overwhelming direct evidence that Appellants were motivated predominantly by race in drawing district lines, does *Miller v. Johnson*, 115 S. Ct. 2475 (1995), require that the District Court find that Appellants' apportionment plan violates the Ohio Constitution as a predicate to finding that Appellants gave less weight to traditional districting principles than to racial considerations?

7. Does Appellants' unfounded fear of a legal challenge to their reapportionment plan under the Voting Rights Act constitute a compelling state interest justifying Appellants' admitted use of race in drawing district lines in a state with no significant racial bloc voting for legislators? *

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* Appellees' Questions 1, 2, 3 and 7 are identical to Questions 1, 2, 3 and 5, respectively, set forth in Appellees' Motion to Dismiss and to Affirm Ruling of Trial Court filed August 25, 1995 in response to Appellants' Jurisdictional Statement prematurely filed on July 24, 1995. Appellants' first Jurisdictional Statement was filed before the District Court had selected a remedy and entered judgment, and purported to appeal opinions that were vacated by the District Court. Accordingly, this Court should not consider Appellants' July 24, 1995 Jurisdictional Statement; however, if this Court considers the Questions and arguments set forth in Appellants' earlier Jurisdictional Statement, then Appellees request that this Court also consider the additional Questions and arguments in Appellees' August 25, 1995 Motion to Dismiss and to Affirm Ruling of Trial Court.

LISTING OF ADDITIONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Secretary to the Apportioning Persons.

Appellees

THOMAS R. FERGUSON, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, TYRONE RILEY, RICHARD CORDRAY, PAUL MECHLING, RONALD GERBERRY, Representative of the 65th Ohio House District, MARY ABEL, Representative of the 78th Ohio House District, and WILLIAM MALLORY.

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MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF TRIAL COURT

OPINIONS BELOW

The August 11, 1995 Order of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 1a.

The August 11, 1995 Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 3a.

The August 11, 1995 Supplemental Dissenting Opinion of Judge Dowd has not been officially reported. It is set forth in Appellants' Appendix at App. 46a.

The August 11, 1995 Judgment of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 53a.

The August 17, 1995 Memorandum and Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 55a.[1]

JURISDICTION

The Orders appealed from were filed on August 11, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

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[1] The following orders and opinions of the three-judge District Court were addressed in Appellants' premature Jurisdictional Statement filed on July 24, 1995 and designated No. 95-132:

The April 28, 1995 Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix in No. 95-132 ("App. (95-132)") at App. (95-132) 1a.

The May 9, 1995 Order of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. (95-132) 81a.

The May 26, 1995 Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. (95-132) 82a.

The March 31, 1994 Opinions and Orders of the three-judge District Court have been officially reported at 857 F. Supp. 579 and 157 F.R.D. 36, and also are set forth in Appellants' Appendix at App. (95-132) 128a and 145a.

The May 26, 1995 Order Vacating Memorandum Opinion (D. 322) and Vacating Order Regarding Admission of Trial Exhibits (D. 320) of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. (95-132) 153a.

The June 23, 1995 Order of Chief Judge Merritt of the United States Court of Appeals for the Sixth Circuit has not been officially reported. It is set forth in Appellants' Appendix at App. (95-132) 155a.

In addition, other opinions and orders in this case include *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993); *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992); *Quilter v. Voinovich*, 1992 WL 677145 (N.D. Ohio Mar. 19, 1992); *Quilter v. Voinovich*, 794 F. Supp. 760 (N.D. Ohio 1992).

STATEMENT OF THE CASE

In Ohio, unlike many other states, the authority to reapportion following a decennial census is conferred upon an Apportionment Board (the "Board"), which acts within narrowly confined limits set by the Ohio Constitution. Ohio Constitution, Article XI. The 1991 Board consisted of Appellants George V. Voinovich, Governor of the State of Ohio, Robert A. Taft II, Secretary of State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Appellees Thomas E. Ferguson, then Auditor of the State of Ohio and Barney Quilter, then Speaker *Pro Tempore* of the Ohio House of Representatives.[2] The majority members of the Board appointed James R. Tilling ("Tilling") as its Secretary; Tilling's primary function was to create a plan of apportionment.

As part of the apportionment process, the Board adopted as its standard the conscious separation of voters by race in order to guarantee the election or re-election of black legislators. Throughout the apportionment process, Tilling and the majority Board members labored under the impression that they were required by federal law to create as many majority-minority districts as possible. In its initial findings of fact, the District Court found that it "addressed an Apportionment Board that applied a rule mandating the creation of majority-minority districts wherever possible. The Board did not purport to devise this rule based upon Ohio policy and law; rather, it contended that such a per se rule is mandated by federal law." *Quilter v. Voinovich*, 1992 WL 677145 (N.D. Ohio Mar. 19, 1992). This Court concurred in the District Court's finding that district lines in Ohio were drawn on the basis of race. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1155-56 (1993).

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[2] Board members Voinovich, Taft and Aronoff constitute the majority Board members; Board members Ferguson and Quilter are the dissenting Board members.

Tilling consistently and repeatedly stated the Board's primary intention to draw district lines on the basis of race. At a public hearing held in Toledo, Ohio on August 26, 1991, Tilling stated that "[t]he courts have said wherever you can create a majority-minority district, you must do so, it's just that simple." D. 348, Ex. 19 at 8. The next day, August 27, 1991, Tilling stated at a public hearing in Columbus, Ohio that "it is the firm commitment of the Apportionment Board to adhere to the Supreme Court guidelines in creating the maximum number of minority districts possible in the State of Ohio. . . . [W]e are under a mandate that wherever a majority minority district can be created, that must be done. It is beyond the realm of discussion." D. 348, Ex. 20 at 12. Similarly, Tilling stated at a public hearing in Cleveland, Ohio on August 28, 1991, that his view was "where a majority-minority district can be created, they must be created. It's just that simple." D. 348, Ex. 21 at 6.

These were not isolated statements; Tilling declared at other public meetings that the Board's primary intention was to create majority-minority districts—a goal that requires attention to racial considerations, not traditional districting principles. For example, in Mansfield, Ohio Tilling stated on August 28, 1991 that "the criteria we're operating under is where a minority district can be created, we are under an obligation to do that." D. 348, Ex. 22 at 5. In Dayton, Ohio on August 29, 1991, Tilling said that "[w]here [the creation of a majority-minority district] can be done, the [Supreme] Court is mandating decision-makers to do that." D. 348, Ex. 23 at 8. At a public hearing in Cambridge, Ohio on September 3, 1991, Tilling declared that "[t]he next thing we have to do really is not in the Ohio Constitution at all, . . . [W]e've got to do everything in our power not to diminish the number of minority districts that are present. And if possible, if there is a way to increase those, we have to try to find that." D. 348, Ex. 25 at 13. On that same day, Tilling stated in Athens, Ohio that "[t]he [Supreme] Court

basically is operating under a very strict standard and is making it clear to those of us around the country that are drawing new lines that the operating principle they were looking for is did the map makers do everything possible to protect existing minority districts, and where possible did they draw lines in such a way to increase minority influence in the general assembly?" D. 348, Ex. 24 at 6-7.

In Charden, Ohio on September 5, 1991, Tilling reiterated the Board's view that it was "under an obligation to not dilute minority voting strengths and in fact, where possible, [it was] instructed to try and increase minority voting strength." D. 348, Ex. 27 at 10. Also on September 5, 1991, Tilling stated in Strongsville, Ohio that "the court directive that we are bound to follow is that there can be no deletion [*sic*] of minority voting strength." D. 349, Ex. 28 at 8. On September 7, 1991, Tilling stated in Columbus, Ohio that "the number of minority districts must be maintained and where possible, they must be increased, and that's very simple; doesn't take a genius to figure it out. It's black and white." D. 349, Ex. 29 at 11.

The evidence that Tilling carried out the Board's policy of basing voting districts primarily upon racial considerations is overwhelming. Tilling's handwritten notes and maps, D. 154, Ex. 120, contain substantial direct evidence of race-based line drawing. Tilling's notes prove that Tilling began the redistricting process by displaying the minority populations of each urban county on his computer screen and drawing "minority districts" first, before attempting to ascertain which pre-existing districts could have been retained as required by Ohio Constitution, Article XI, § 7(D). D. 154, Ex. 120. For example, Tilling's notes state, with respect to Franklin County, "[a]void primarily white Bexley and Whitehall." *Id.* In Hamilton County, Tilling's notes confirm the Board's intention to "start with majority-minority districts, begin around the downtown area and configure a district including the greatest portion of the eastern segment of

black population, mostly City of Cincinnati." *Id.* at 4. As reflected in Tilling's notes regarding Summit County, the Board's intent was to "try to maximize the minority voters in [Vernon Sykes'] district." *Id.* at 6. At the Apportionment Board hearing, held on September 30, 1991, the Board stated that "[w]e subscribe to the interpretation of the Voting Rights Act that says that it is the obligation of draftsmen to create a majority minority district where possible." D. 349, Ex. 31 at 106.

Substantial additional evidence that the Board primarily was motivated by racial considerations in drawing district lines is set forth in the Board's Findings of Fact and Conclusions of Law ("Board Findings"), adopted by the majority Board members on February 18, 1992. The Board's Findings demonstrate that the Board acted under the premise that during the decade of the 1990's, some or all of Ohio's incumbent black legislators might retire, die or move on to other political posts. Board Finding No. 172, D. 147, Ex. A at 73. With that assumption as his guide, Tilling drew lines to "ensure" that a black incumbent's replacement (always assumed to be another black) would be elected. *Id.* at 71.[3] The Board set about implementing its strategy of drawing district lines on the basis of race on a county by county basis.

In Franklin County, Tilling "reconfigured House Districts 29 and 31 . . . to protect minority voters in those

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[3] The Board, in its Findings, attempted to justify its actions by relying on a regression analysis of the effect of incumbency in elections in Ohio minority districts for the years 1984, 1986, 1988 and 1990. Board Finding No. 173, D. 147, Ex. A at 73. Dr. King, Appellants' expert, found that for those years, black incumbents had an election advantage of 6-10% over non-incumbents. *Id.* To ensure that a new black candidate, running without the incumbency advantage, would be guaranteed election, Tilling drew race-based district lines calculated to provide new black candidates with election margins of not less than 68% and as high as 81%, averaging 77.6%. *Id.* at 75. Black incumbents themselves would be elected under Tilling's plan by margins of no less than 75% and as high as 89%, averaging 80%. *Id.* Tilling himself admitted that such electoral margins constitute "landslides." D. 312 at 313.

districts and to create a minority Senate District in Franklin County where none previously existed." Board Finding No. 189, D. 147, Ex. A at 86. The Board was motivated by the facts that (1) the incumbent black Franklin County legislators (Representatives Miller and Beatty) had indicated a desire to run for different offices; (2) it believed that the Voting Rights Act required the Board to protect classes of voters; and (3) it was concerned that Representatives Miller and Beatty would not serve out the decade. *Id.* at 86-87. Thus, Tilling reconfigured their districts to guarantee the future election of minority candidates, regardless of the plans of the two current incumbents. *Id.*

Board Finding No. 256, *id.* at 108, shows that Representative Miller's district, under the previous apportionment plan (with 1990 population), had 38.5% black population. Instead of honoring its obligation to maintain that district under § 7(D) of the Ohio Constitution, where Representative Miller had been elected for six terms with pluralities of better than two-to-one, the Board increased the black population of Representative Miller's new district to 44.68%, a 6.1% increase. Similarly, the black population of Representative Beatty's district was 48.6% in 1990, but the new race-based district created by Tilling increased Representative Beatty's black population to 54.3%, a 7.5% increase.[4]

In Lucas County, the Board "tried, as the Voting Rights Act makes clear, to draw the districts to protect a class of voters, not the particular incumbent in that situation. And that's why we basically added additional minority votes to that district, not because Casey Jones

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[4] The Board, on February 18, 1992, reduced the black population of Representative Miller's district from 55.92% to 54.3% and Representative Beatty's district from 48.29% to 44.68%. D. 349, Ex. 33 at 60-61. Tilling referred to those changes as "technical corrections", reiterating his view that the changes still would ensure that black voters of those districts would be able to elect a black candidate. *Id.* at 59-61.

[the black representative from Lucas County] needed them but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candidate of their choice." Board Finding No. 177, D. 147, Ex. A at 77. Representative Jones' district in Lucas County, District 45, met the population requirements and, therefore, should have been retained, if possible, pursuant to Article XI, § 7(D) of the Ohio Constitution. Board Finding No. 52, *id.* at 16. Nevertheless, without even attempting to maintain Representative Jones' district, the Board included additional minority votes "not because [he] needed them" but, rather, because his successor might need them. Board Finding No. 177, *id.* at 77.

All four of the districts in Summit County met the population requirements of the Ohio Constitution, and should have been retained, if possible. Board Finding No. 52, *id.* at 16. The Board abdicated its responsibility to follow the Ohio Constitution by increasing the minority population of House District 42, represented by black legislator Vernon Sykes. The Board's sole justification for reconfiguring all four of the districts in Summit County was "that the district was losing black population and to avoid minority vote dilution." Board Finding No. 194, *id.* at 92.

In Montgomery County, the Board again adopted the vague criteria of "population shifts" and "avoidance of minority vote dilution" as justification for its race-based lines. Board Finding No. 193, *id.* at 90, states that "[i]n drafting the 1991 Apportionment Plan, Mr. Tilling also took into account the [black] population shifts in Montgomery County in reconfiguring districts in that county." Tilling stated that he reconfigured Representative McLin's district in order to avoid dilution of minority voting "especially in light of population trends throughout the decade." *Id.* at 91.

With respect to Hamilton County, the Board reiterated its determination to draw race-based lines:

> "Mr. Tilling, in drafting the 1991 Apportionment Plan, also determined that the Voting Rights Act protected classes of voters not incumbents. Since Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 to increase the relative percentage of black population in that district in order to provide an opportunity for a new black candidate, without benefit of incumbency, to be elected in that district."

Board Finding No. 183, *id.* at 82. Similarly, with respect to minority Representative Rankin in Hamilton County, the Board's original lines resulted in an increase in the black population of her district from 53.2% to 61%; that amount subsequently was reduced to 56%. Once again, the Board's rationale for the increased black population in Representative Rankin's district was that a new black candidate would require a district with increased black population to be successful. Board Findings Nos. 186-87, *id.* at 84.

Appellees commenced this action in the United States District Court for the Northern District of Ohio on November 1, 1991, challenging the apportionment plan adopted as Amendment C by the Board on October 1, 1991. D. 1. In their complaint, Appellees alleged that Amendment C violated § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. The District Court agreed that Amendment C violated § 2 of the Voting Rights Act and, on January 31, 1992, directed the Board either to show justification for its use of race in drawing districts or to submit a revised plan within twenty days. *Quilter v. Voinovich*, 794 F. Supp. 695, 701-02 (N.D. Ohio 1992).

In response to the District Court's directive, the majority Board members, on February 18, 1992, signed and submitted to the District Court their Findings of Fact and Conclusions of Law. D. 147, Ex. A. Immediately

following the adoption of their Findings, the majority members of the Board also adopted Amendment D, the plan at issue in this case. *Id.* at 107. Amendment D contained "technical corrections" to Amendment C, and reduced the number of majority-minority districts from eight to five. *Id.*; D. 147, Ex. C at 59. However, Amendment D perpetuated the race-based redistricting that always had been an integral part of Tilling's plan of apportionment.

On March 10, 1992, the District Court again ruled that Appellants' use of race in redistricting was not justified, and held that Amendment D violated § 2 of the Voting Rights Act and the Fifteenth Amendment. *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992). On appeal, this Court found that the evidence presented by Appellants failed to demonstrate "sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice." *Voinovich v. Quilter*, 113 S. Ct. 1149, 1158 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986)). In that same opinion, this Court reversed the District Court's findings of violations of the Voting Rights Act and the Fifteenth Amendment, and remanded the case to the District Court for a determination of whether the plan's deviation from equal population among districts violated the Fourteenth Amendment. *Voinovich*, 113 S. Ct. at 1154.

Following remand, Appellees amended their complaint to challenge Appellants' admitted use of race in their plan as a conscious attempt to segregate voters by race in violation of the Fourteenth Amendment, as recognized by this Court in *Shaw v. Reno*, 113 S. Ct. 2816 (1993). Following a trial on November 16-17, 1994, the District Court again held, on April 28, 1995, that race was "a substantial and motivating factor" in the creation of at least House Districts 21, 22, 30, 31, 38, 39, 44 and 49, *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio Apr.

28, 1995), Appellants' App. (95-132) 34a, and directed Appellants to redraw those districts. *Id.* at 39a.

The District Court did not enter judgment in conjunction with its April 28, 1995 decision; that decision was not a final, appealable order because a remedy had not been selected by the District Court. Accordingly, on May 9, 1995, the District Court issued an order stating that *"preparatory to filing a Rule 54 Judgment Entry,* the parties are invited to submit by May 31, 1995 proposed remedies for the purpose of implementing the decision." *Quilter v. Voinovich,* No. 5:91CV-2219 (N.D. Ohio May 9, 1995), Appellants' App. (95-132) 81a (emphasis added). Despite the fact that the District Court stated expressly on May 9, 1995 that it had not entered judgment and had not selected a remedy in this matter, Appellants filed a notice of appeal on May 26, 1995. D. 329.

Also on May 26, 1995, the District Court vacated its April 28, 1995 Opinion (D. 325, Appellants' App. (95-132) 153a) and issued an amended opinion that disposed of Appellants' erroneous (and disingenuous) argument that the Board had not drawn district lines on the basis of race but, rather, had followed the mandates of the Ohio Constitution. Appellants' App. (95-132) 82a at 123a-126a and n.19.[5] Once again, a judgment entry was not filed; nevertheless, Appellants filed a second notice of appeal (D. 335) and prematurely filed a Jurisdictional Statement on July 24, 1995. The District Court subsequently vacated its May 26, 1995 Opinion (D. 341), issued a new Opinion framing its analysis of the facts

[5] Specifically, the District Court concluded that "even if we did conclude that compliance with the traditional districting principles in Article XI [of the Ohio Constitution] could constitute a compelling state interest justifying racial gerrymandering, the [Appellants] would still lose because the evidence reveals that the Apportionment Board did not comply with section 7(D) of Article XI." *Id.* at 124a.

in terms of the standard articulated by this Court in *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (D. 342) and entered judgment in favor of Appellees and against Appellants on August 11, 1995. D. 344.

I. APPELLANTS' APPEAL DOES NOT PRESENT SUBSTANTIAL QUESTIONS

Substantial questions of law deserving of this Court's attention are omitted from Appellants' appeal. Since the last decennial census, this Court has addressed substantial issues relating to the use of race in the creation of voting districts; through those cases,[6] this Court has provided apportioning bodies with significant guidance in drawing district lines. By contrast, this Court's resolution of the questions presented by Appellants' appeal, which largely are procedural, will add little or nothing to the jurisprudence in this area.

Having made numerous admissions that many districts were drawn predominantly on the basis of race, Appellants understandably are alarmed by this Court's recent pronouncements, and are attempting to avoid the impact of those precedents by raising procedural barriers to the District Court's consideration of the merits of their plan. Appellants' appeal of these procedural issues trivializes the role of this Court.

This Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Vinson, C.J., Address to the American Bar Ass'n, Sept. 7, 1949, 69 S. Ct. v., vi. Rather, "[t]he Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions, and other important questions of law for the public benefit."

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[6] *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993); *Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *United States v. Hays*, 115 S. Ct. 2431 (1995).

Taft, C.J., Hearings Before the House Committee on the Judiciary, 67th Cong., 2d Sess., ser. 33, at 2 (1922). The questions presented by Appellants' Jurisdictional Statement do not meet the criteria for review by this Court.

Procedural questions such as the District Court's discretion to allow amendment of Appellees' complaint after remand, Appellees' standing to challenge a redistricting plan that admittedly was drawn on the basis of race, or the question of whether Appellants' premature notice of appeal divested the District Court of jurisdiction to amend its Opinion present issues that are limited to the unique facts of this case. Similarly, the question of whether the District Court, based on the particular facts presented to it at trial, properly found that Appellants had given less weight to traditional districting principles than to racial considerations does not present this Court with the opportunity to decide an issue of significant precedential value. Since this Court's resolution of the procedural and factual issues presented by Appellants' appeal will not settle substantial questions of great or lasting legal significance, consideration of those issues trivializes the role of this Court.

II. THE DISTRICT COURT HAD JURISDICTION TO ENTER ITS ORDERS OF AUGUST 11, 1995

Supreme Court Rule 18.1 provides that "[a] direct appeal from a decision of a United States district court, when authorized by law, is commenced by filing a notice of appeal with the clerk of the district court within 30 days after *the entry of the judgment sought to be reviewed.*" (Emphasis added). Although Appellants filed two notices of appeal (on May 26 and June 23, 1995) prior to the Opinion filed by the District Court on August 11, 1995 (Appellants' App. at 3a), since no judgment had been entered by the District Court, those notices of appeal were premature. A district court is not divested of jurisdiction by a faulty or premature appeal.

"A baseless notice of appeal does not divest the district court of its jurisdiction." *McMath v. City of Gary*, 976 F.2d 1026, 1031 (7th Cir. 1992). "[A] notice of appeal from a plainly nonappealable order may properly be ignored by the district court." *Cochran v. Birkel*, 651 F.2d 1219, 1222 (6th Cir. 1981), *cert. denied*, 454 U.S. 1152 (1982). This is the rule because allowing an improper notice of appeal to divest a district court of jurisdiction would "leave[] the court powerless to prevent intentional dilatory tactics, foreclose[] without remedy the nonappealing party's right to continuing trial court jurisdiction, and inhibit[] the smooth and efficient functioning of the judicial process." *United States v. Hitchmon*, 602 F.2d 689, 694 (5th Cir. 1979).[7]

Appellants attempt to justify their filing of two premature notices of appeal through irrelevant references to 28 U.S.C. § 1292(a). Jurisdictional Statement, pp. 13-14. However, Appellants concede that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1253, not § 1292(a). *Id.* at 3. "This Court has more than once stated that its jurisdiction under the Three-Judge Court Act [§ 1253] is to be narrowly construed since 'any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket.'" *Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (quoting *Phillips v. United States*, 312 U.S. 246, 250 (1941)). Supreme Court Rule 18.1 authorizes a direct appeal only after an entry of judgment;

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[7] The United States Court of Appeals for the Ninth Circuit has reached a similar conclusion. In *Legalization Assistance Project v. INS*, 976 F.2d 1198, 1203 n.5 (9th Cir. 1992), *vacated on other grounds*, 114 S. Ct. 594 (1993), the INS asserted that the district court did not have the authority to issue an order because a notice of appeal had been filed. The Ninth Circuit, however, held that "district courts have authority to revise an order or other form of decision *at any time before the entry of judgment adjudicating all claims, rights and liabilities of the parties.*" *Id.* (emphasis added).

that the District Court neither entered nor intended to enter judgment prior to August 11, 1995, is evidenced by the District Court's Order of May 9, 1995 (D. 324) stating that "preparatory to filing a Rule 54 Judgment Entry, the parties are invited to submit by May 31, 1995 proposed remedies." Appellants' App. (95-132) 81a.[8] Since the only appealable order was the District Court's August 11, 1995 Opinion, which was accompanied by a judgment entry directing Appellants to take remedial action to correct their unconstitutional plan, Appellants' prior notices of appeal were of no force or effect.

III. THE DISTRICT COURT PROPERLY APPLIED THIS COURT'S DECISION IN *MILLER v. JOHNSON*

The District Court clearly and unequivocally found that:

> "Based on our thorough review and consideration of all the evidence presented in this case, we find that race was the predominant motivating factor in the [Appellants'] creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan because traditional districting principles were subordinated to or given less weight in the reapportionment process than racial considerations. These House districts are the result of racial gerrymandering. Although none of these districts presents a bizarre shape, both direct evidence from trial testimony and the Apportionment Board's Findings and Conclusions and circumstantial evidence from Tilling's notes and accompanying maps, clearly reveal that the [Appellants] intention-

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[8] Appellants make the illogical argument that "this Court's jurisdiction was invoked when Appellants filed their notice of appeal from the district court's May 26, 1995, opinion." Jurisdictional Statement, p. 12. Appellants offer no explanation as to why, under their theory, this Court's jurisdiction was not invoked when Appellants filed their notice of appeal from the District Court's April 28, 1995 Opinion. Since the District Court's May 26, 1995 Opinion, like its April 28, 1995 Opinion, was not a final judgment, this Court's jurisdiction was not invoked by Appellants' improper notices of appeal.

> ally crafted these eight districts with the predominant purpose of separating voters on the basis of race."

Appellants' App. 3a at 36a-37a. Despite this finding, Appellants argue that the "district court majority did not find that Appellants 'relied on race in substantial disregard of customary and traditional districting principles.' " Jurisdictional Statement, p. 18 (quoting *Miller v. Johnson*, 115 S. Ct. 2475, 2497 (1995) (O'Conner, J., concurring)). Appellants' argument ignores the express language of the District Court's opinion, and is not worthy of serious consideration by this Court.

Appellants' attempts to defend their admitted use of race in drawing district lines has drawn them to increasingly untenable positions. For example, Appellants mislead this Court by asserting that "[s]ince the adoption of Amendment D, no court has ever found that any district in Amendment D violated any provision of the Ohio Constitution, or any traditional districting principle." Jurisdictional Statement, p. 19. In their next breath, Appellants admit that this statement is false by conceding that, in its May 26, 1995 Opinion, "*the district court majority had concluded that Appellants violated Article XI, § 7(D) of the Ohio Constitution* by not retaining more districts from the prior apportionment. App. (95-132) 124a-125a, n.19." *Id.* at n.16 (emphasis added).

Although the District Court, in its August 11, 1995 Opinion, abstained from deciding the issue of whether Appellants' plan violates the Ohio Constitution, Appellants' App. 3a at 35a-36a, Appellants' suggestion that the District Court did not find that Appellants relied on race in substantial disregard of traditional districting principles is meritless. In its August 11, 1995 Opinion, the District Court analyzed the facts of this case under the standard articulated by this Court in *Miller*, and concluded that *"racial considerations were the predominant factor in the [Appellants'] 1992 reapportionment plan."*

Appellants' App. 3a at 28a (emphasis added). By holding that Appellants were predominantly motivated by race, the District Court necessarily found that traditional districting principles were improperly subordinated to racial considerations by Appellants. Thus, under the facts presented to the District Court, Appellants' plan is unconstitutional under *Miller*.

IV. BASED ON THE OVERWHELMING EVIDENCE THAT APPELLANTS WERE MOTIVATED PRIMARILY BY RACE IN DRAWING DISTRICT LINES, THE DISTRICT COURT PROPERLY CONCLUDED THAT APPELLANTS GAVE LESS WEIGHT TO TRADITIONAL DISTRICTING PRINCIPLES THAN TO RACIAL CONSIDERATIONS

Despite the overwhelming evidence—from the testimony of Appellants' witnesses, Tilling's statements at public meetings, the Board's Findings, Tilling's notes, and elsewhere—that the Board's main consideration in drawing district lines was the creation of majority-minority districts in order to comply with the federal Voting Rights Act, Appellants ask this Court to reverse the District Court's factual determination that traditional districting principles were given less consideration than racial factors in Appellants' apportionment plan. Jurisdictional Statement, p. 20. Appellants' suggestion that the District Court did not have substantial evidence from which it could find that race was the predominant factor motivating the Board's actions is specious.

Appellants attempt to dismiss the extensive admissions of race-based districting contained in Tilling's handwritten notes, and in the Board's Findings, as the "only two items" of evidence that the District Court could cite to establish racial gerrymandering. *Id.* Those "two items" constitute more than enough direct evidence for the District Court to conclude that Appellants consciously separated voters by race.

Appellants argue that Tilling's handwritten notes are irrelevant because they relate to Amendment C. *Id.* at 21. Appellants do not inform the Court that the unconstitutional line drawing in the challenged plan (Amendment D) was derived from Amendment C, and that Tilling's race-based lines in Amendment C were not abandoned or replaced by the adoption of Amendment D. Similarly, Appellants' argument that the reduction of the number of majority-minority districts from nine in Amendment C to five in Amendment D somehow establishes that race was not the predominant motivating factor in Amendment D, *id.*, establishes only that Tilling continued to be preoccupied by racial considerations as he amended his plan.

Appellants also argue that the Board's Findings are irrelevant because they "merely constitute a *post hoc* rationalization for the plan eventually adopted." *Id.* at 22. What Appellants euphemistically call a "*post hoc* rationalization" is a signed document that spells out the numerous ways in which Appellants based their plan on the race of voters and candidates in order to ensure that black candidates would be elected or re-elected by black voters. The fact that the Board did not admit in writing that it was primarily motivated by race until directed by the District Court to justify its inclusion of majority-minority districts in Amendment C does not render erroneous the District Court's conclusion that Appellants gave greater weight to racial considerations than to traditional districting principles in its apportionment plan.

CONCLUSION

For all of the foregoing reasons, Appellants' appeal should be dismissed and the August 11, 1995 Opinion of the District Court should be affirmed.

Respectfully submitted,

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